

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



To Be Argued By  
Harold J. Boreanaz

**76-1036**

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In The  
**United States Court of Appeals**  
For the Second Circuit

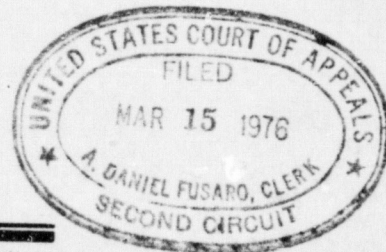
THE UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

vs.

FREDERICO G. RANDACCIO,  
*Defendant-Appellant.*

**BRIEF FOR DEFENDANT-APPELLANT**

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**BRIEF FOR DEFENDANT-APPELLANT**

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Preliminary Statement

Appellant was charged in a two-count indictment with having violated Title 18 U.S.C. §§ 1951 and 371 and thereafter convicted on both counts after a trial by jury. He appealed from the judgment of conviction which this Court affirmed on July 30, 1968. United States vs. Caci, et al, 401 F.2d 664 (2d Cir. 1968). Appellant then petitioned for a writ of

certiorari to the United States Supreme Court and that Court vacated the judgment and remanded the matter for a hearing to determine whether the prosecution's case was based on "tainted evidence" resulting from electronic surveillances. Giordano vs. United States, 394 U.S. 310 (1969). A hearing in accordance with the order of remand was held before the Hon. John O. Henderson, U.S.D.J., on August 27 and 28, 1969.

Upon said hearing, counsel for appellant conceded that evidence of "taint" was not revealed but sought relief by way of a new trial upon the ground of newly discovered evidence.

The denial of this motion was affirmed by this Court (440 F.2d 1137).

Thereafter, a co-defendant sought relief before the Hon. Harold P. Burke, U.S.D.J., contending that the sentences imposed upon him (20 years under the 18 U.S.C. 1951 first count of the indictment, and five years under the 18 U.S.C. 371 second count) were illegal.

The denial of this relief was reversed by this Court, Natarelli vs. United States, 516 F.2d 149, with a direction to re-sentence.

Thereafter the instant proceeding was commenced by



appellant pursuant to 28 U.S.C. 2255. The matter came on to be heard on November 24, 1975, before the Hon. Harold P. Burke, U.S.D.J., at Rochester, New York.

On December 1, 1975, the Court ordered the vacation of appellant's sentence and directed that he be returned for re-sentence on December 22, 1975.

On December 22, 1975, appellant's counsel filed with the Court an affidavit seeking to expand the original "2255" application to include contentions that the original trial was in fact "tainted" by illegal electronic surveillance, that the taint permeated the pre-sentence report, and seeking an adjournment of the sentence to respond to a letter forwarded to the Court urging a stiff sentence.

On December 24, 1975, appellant's counsel filed a further affidavit amplifying the contention of "taint" attenuating the conviction, seeking a hearing to demonstrate the issues of Constitutional proportion going to the propriety of the conviction and seeking a delay in sentence.

The Court refused to entertain any attack directed to the validity of the conviction and refused any further adjournment of sentence.

Appellant now appeals the District Court's Order of December 24, 1975 refusing to consider the questions raised in

this 28 U.S.C. 2255 proceeding and refusing an adjournment of the sentence.

#### Questions Presented

(1) Was appellant entitled to be heard by way of collateral attack upon his judgment of conviction upon the ground of an infringement of his Constitutional rights?

(2) Was appellant denied due process and the effective assistance of counsel by virtue of the refusal to adjourn the sentence in order to allow counsel to rebut allegedly erroneous material presented to the Court by the pre-sentence report and the Government?

#### POINT I

##### APPELLANT WAS ENTITLED TO BE HEARD UPON THIS COLLATERAL ATTACK OF HIS JUDGMENT OF CONVICTION

At the time of the commencement of these proceedings, appellant was (and still is) incarcerated at the United States Penitentiary at Danbury, Connecticut. He had been continuously in custody since November 21, 1967.



The Notice of Motion and the prayer for relief both clearly state that the proceedings were brought pursuant to Title 28 U.S.C. 2255. Appellant sought to have his sentence vacated upon the ground that it was imposed in violation of the laws of the United States.

In pertinent part 28 U.S.C. 2255 provides that:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

. . .

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

. . .

On December 1, 1975, the Court entered an Order, without opposition by the Government, vacating the sentence originally imposed and directing the United States Marshal to produce the defendant for re-sentence, after a review of the pre-sentence report and allocution. This Order directed that re-sentence was to proceed at the United States District Court in Rochester, New York on December 1975.

In the intervening years the sentencing judge, the Hon. John O. Henderson, had died, and the United States District Court Judge sitting at Buffalo, New York, the Hon. John T. Curtin, had disqualified himself inasmuch as he had been the United States Attorney at the time of the return of the indictment herein. The matter therefore came on before the Hon. Harold P. Burke at the United States District Courthouse at Rochester, New York.

On December 22, 1975, prior to the imposition of sentence, appellant through his counsel filed an Affidavit setting forth certain allegations substantially affecting the legality of the original conviction and questioning the legality of certain material contained in the pre-sentence report.

Simply stated, these allegations asserted that appellant's Constitutional rights had been violated by subjecting him to illegal electronic surveillance, during a period of time



encompassing the time span of the indictment herein, which had not been previously disclosed in any prior proceeding by the Government, and which constituted a violation of the mandate of the United States Supreme Court, at a time when the case had been previously remanded for the purpose of full disclosure with respect to illegal electronic surveillance. It was claimed that these violations had in fact tainted the original trial and had in fact permeated the pre-sentence report upon which the original sentence had been predicated and which was then before the Court upon the proposed re-sentence. In addition, the Government attorney had forwarded to the Court, providing counsel with a copy, a 10-page letter, together with numerous exhibits, containing derogatory material with respect to the defendant, which it was claimed, at least in part, also contained material which was the product of illegal electronic surveillance.

An adjournment of the sentence was requested for the purpose of allowing counsel to fairly meet this attack upon the defendant's rights. The Court allowed a two-day adjournment and requested the Government to put something in writing with respect to the assertions then before the Court.

By an unsworn memorandum dated the following day, December 23, 1975, the Government opposed any further adjournment and asserted that the defendant had not offered proof to

demonstrate that he now possessed new information concerning illegal electronic surveillance in addition to that which had already been disclosed in prior proceedings. The Government also asserted that the defendant's contentions were devoid of assertion as to the source of information or details with respect to the alleged additional illegal electronic surveillance. The final position of the Government was that the contentions before the Court, if properly asserted, were not reachable in this proceeding, but could be reached if the proceeding were brought pursuant to Title 28 U.S.C. 2255 or Rule 35 of the Federal Rules of Criminal Procedure.

It is interesting to note that this position of the Government completely avoids the proposition that the proceedings in fact were brought pursuant to Title 28 U.S.C. 2255.

The following day defense promptly responded with an additional Affidavit setting forth in copious detail the code names of locations of additional illegal electronic surveillance to which the appellant had been subjected. The Affidavit contained the approximate times and locations of these installations. A full and complete statement as to the means of disclosure with respect to this information was set forth, as well as a reference by docket number to a 1973 opinion in the Western District of New York by the Hon. John O. Henderson.



The Affidavit by counsel also sought to raise an additional contention involving the unconstitutional composition of the panel of jurors from which the appellant's trial jury had been selected. This issue had been raised upon direct appeal, but counsel contended that subsequent to the completion of the original direct appeal, additional cases had established the correctness of the position formerly taken by appellant's then trial counsel.

There was no response to any of these assertions by the Government. The Government failed to controvert any of the assertions with respect to illegal electronic surveillance and their taint of the Government's original case. No response was requested by the Court. The assertions were put before the Court by way of counsel's Affidavit.

In addition, the Court was advised that the information contained in the original pre-sentence report was inaccurate and distorted.

The Court refused any further adjournment of the proceedings and proceeded to re-sentence the defendant.

Appellant had made no prior "2255" application. He was clearly entitled to a hearing to review the alleged violations of his Constitutional rights. Kaufman vs. United States,

394 U.S. 217, 89 S.Ct. 1068 (1969); Townsend vs. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963). This would be true even if appellant's contentions did not assume Constitutional dimension, even though we claim that they did. Davis vs. United States, 417 U.S. 333, 94 S.Ct. 2298 (1974). It would also be true even if the contentions raised went to the issue of a change in legal status occurring after completion of a direct appeal such as alleged with respect to the jury selection issue.

This Court should reverse the judgment herein and remand with direction to afford appellant a hearing upon his contentions.

#### POINT II

#### THE COURT SHOULD HAVE AFFORDED COUNSEL AN OPPORTUNITY TO BE HEARD UPON SENTENCE

The right to be heard and the right to counsel are of no value unless the opportunity to be fairly and fully exercised is afforded. Rule 32 of the Federal Rules mandates the opportunity to be heard.

The Court clearly stated:



"I have relied heavily on the information provided in the pre-sentence reports in this case, which have been available to this defendant."

(See page 12 of proceedings of December 24, 1975)

The reports in question were in fact the original pre-sentence report and a multi-page document presented by the Government's attorney purporting to contain "informer" information.

The Court was clearly advised that the defendant hotly contested the accuracy and truthfulness of these reports and desired time to further demonstrate to the Court the facts which would support his contentions.

The Government opposed adjournment, for no apparent reason, and the Court agreed.

The defendant was in custody and was going to remain in custody.

A defendant is entitled to attack information provided to the Court which constitutes the basis for the exercise of a judgment with respect to sentence.

While it is perhaps true that a court may consider illegally procured information as a part of his sum of information with respect to sentence, should a defendant not be

entitled to show that the sources of that information are tainted?

The exercise of judgment ranges into many and varied subtle variances of degree with respect to the weight to be accorded given information.

A prior conviction, although founded upon fact, may be valueless in terms of contributing to the "legal" judgment called sentence. United States vs. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972).

It is true that the burden to demonstrate the inaccuracy of the information supplied to the Court rests upon the defendant. United States vs. Rollerson, 491 F.2d 1209 (1974); United States vs. Rogers, 466 F.2d 513 (1972).

This Court has urged a liberal disclosure of pre-sentence material. United States vs. Fischer, 381 F.2d 509. Disclosure is of no value unless the opportunity to controvert is provided.

The Seventh Circuit recently addressed itself to some of the problems arising out of reliance upon faulty prior convictions. Crovedi and Others vs. United States, 517 F.2d 541 (1975).



Is there any difference between a conviction garnered by illegal means and "information" procured by direct, intentional, trespassory, unconstitutional action by Government agents? United States vs. Janiec, 464 F.2d 126 (1972).

This Court should therefore upon remand direct that appellant be afforded a full and fair opportunity to attack the "pre-sentence" information relied upon by the Court below.

Respectfully submitted,

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